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In the Supreme Court of the United States

OCTOBER TERM, 1984

PUERTO RICO AQUEDUCT
AND SEWER AUTHORITY,
PETITIONER,

v.

PAUL N. HOWARD COMPANY,
INSURANCE COMPANY OF NORTH AMERICA,
RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Statement of the Case

This case arises out of a construction project that respondent, Paul N. Howard Company (hereinafter "Howard") agreed as a general contractor to construct for the Puerto Rico Aqueduct and Sewer Authority (hereinafter "PRASA"). After

[1] Pursuant to Supreme Court Rule 28.1, it is stated that respondent, Paul N. Howard Company, is a wholly owned subsidiary of ITT Corp. Howard Corp., Howard of Egypt and Howard of Saudi Arabia are all subsidiaries of Paul N. Howard Company. Howard International Establishment is an affiliate of Paul N. Howard Company.

partial construction of the project, Howard sued PRASA for monetary damages arising from PRASA's breach of the contract and rescission of the contract regarding the portions of the project which remained uncompleted. The district court awarded Howard damages in the amount of $3,965,575.73 to compensate it for changes PRASA ordered to the required pile capacity, changes PRASA ordered in the number of piles required by each pipe section, movements of construction operations made necessary by PRASA acts, unreasonable delays by PRASA in notifying design changes, a differing site condition which was encountered, reduction by PRASA of the quantities of work to be performed under the contract, materials purchased for construction of project, extraordinary management time and travel, PRASA's failure to comply with payment provisions of the contract, PRASA's failure to pay for work performed under the contract and withholding by PRASA of amounts due under the contract. See District Court Opinion, Petition, Appendix B. PRASA appealed to the United States Court of Appeals for the First Circuit which affirmed the judgment entered by the district court. See Court of Appeals Opinion, Petition, Appendix A.

The correctness of the costs incurred by Howard during construction of the project and consequently granted by the district court to Howard as damages is not contested. Aside from the issue of Eleventh Amendment immunity, the only other issue before the court involves federal contract law regarding the existence of a differing site condition.

The Aqueduct and Sewer Act of Puerto Rico, Law No. 40 of May 1, 1945 as amended, 22 L.P.R.A. §§141-168, creates PRASA as a body corporate with perpetual existence as a corporation and empowers it to sue and be sued in its corporate name; to acquire property, real, personal, or mixed, tangible or intangible by any lawful means; to hold, operate, and administer said property and to dispose of any part thereof that PRASA shall find to be surplus to its purposes; to have

complete control and supervision of its properties and activities, including the power to make and enforce such rules and regulations for the maintenance and operation thereof, as in the judgment of PRASA may be necessary or desirable for the efficient operation thereof including the power to determine the character of and necessity for all its expenditures and the manner in which they shall be incurred, allowed and paid and such determination shall be final and conclusive; to make contracts and to execute all instruments necessary or convenient in the exercise of any of its powers and to determine, fix, alter, charge and collect, as provided herein, reasonable rates, fees, rentals, and other charges for the use of PRASA's facilities, or for the water, and sewerage services or other commodities or services sold, rendered or furnished by it. *Id.* §144(a), (c), (d), (e), (i) and (j).

Furthermore, PRASA has no power at any time or in any manner to pledge the credit or taxing power of the Commonwealth of Puerto Rico or any of its other political subdivisions. The bonds and other obligations issued by PRASA are not a debt of the Commonwealth of Puerto Rico nor any of its municipalities nor of its other political subdivisions and neither the Commonwealth of Puerto Rico nor any of its municipalities nor its political subdivisions are liable thereon, nor are such bonds or other obligations paid out of any funds other than those of PRASA. 22 L.P.R.A. §144.

From PRASA's certified financial statements for the year ended June 30, 1982, it appears that it had a total capital of $938,066,093.00 with retained earnings of $89,356,657.00 and net revenues in 1982 of $19,131,838.00. These amounts far exceed the amount of the judgment in this case. PRASA does not seriously dispute Howard's assertion that the judgment in this case will be paid out of PRASA's funds, rather than those of the Commonwealth of Puerto Rico, Petition at 10a, and PRASA has never argued that the general funds of the Commonwealth of Puerto Rico are in any way involved or relevant to this matter.

The Court of Appeals held that PRASA was not sufficiently an arm of the state to qualify for immunity under the Eleventh Amendment. In so doing the Court noted the fact that PRASA is financially independent of the Commonwealth and found persuasive several opinions of the Supreme Court of Puerto Rico holding that PRASA did not enjoy the immunity traditionally accorded to a state.

The Court further held that PRASA had in any case waived its Eleventh Amendment immunity by its appearance and active participation in the litigation of this suit which included filing a counterclaim and third-party complaint.

The Court of Appeals rejected PRASA's contentions as to the existence of a differing site condition noting that it had not been referred to nor had it found any evidence that the district court committed a clear error in its findings of fact. Petitioner's continual reference to part of the testimonial evidence presented during the trial and its failure to address directly the district court's findings of fact must not be overlooked. In effect, petitioner does not attack the application of established legal principles to the facts as determined by the district court. Instead, what petitioner is requesting is that this court set aside the district court's findings of fact as clearly erroneous. The Court of Appeals has already refused said request.

Reasons for Denying the Writ

I. The Decision of the Court of Appeals That PRASA Enjoys No Eleventh Amendment Immunity Is Consistent With Decisions of Other Courts of Appeals and Prior Decisions of This Court Which Establish the Limits of Eleventh Amendment Immunity.

Petitioner alleges that the Courts of Appeal have adopted different standards for determining the applicability of Eleventh Amendment immunity to entities created by a state, which at the same time are to some extent autonomous or

distinct from the state. One line of analysis supposedly focuses on the financial structure of the entity and whether the judgment would be paid directly from the state treasury. The other line of analysis supposedly focuses upon the nature of the entity within the governmental structure of the state.

Petitioner alleges that the Court of Appeals incorrectly applied the first line of analysis set forth in the preceding paragraph and that application of the second line of analysis would result in the conclusion that PRASA is entitled to Eleventh Amendment immunity. We disagree. There is no conflict of authority among the Federal Courts of Appeal on the proper analysis for extension of Eleventh Amendment immunity and the Court of Appeals for the First Circuit did not depart from the correct analysis in this case.

Petitioner does not seriously dispute that the judgment rendered in this case will be paid out of PRASA's funds rather than those of the Commonwealth of Puerto Rico. Petition at 10a. This being the case, the Court of Appeals correctly concluded that PRASA was not entitled to Eleventh Amendment immunity. See *Ford Motor Co.* v. *Treasury Department*, 323 U.S. 459, 463 (1945); *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974).

The above notwithstanding, application of the second line of analysis suggested by petitioner leads us to the same conclusion. Eleventh Amendment immunity is designed to protect the states from the intervention of individual interests, via federal courts, that would disrupt the public policy and administration of the public affairs of the states without their consent. *Ex Parte Ayers*, 123 U.S. 443, 505 (1887); *Blake* v. *Kline*, 612 F.2d 718, 725 (3rd Cir. 1979), *cert. denied* 447 U.S. 921 (1980).

The essence of petitioner's argument is that when an entity created by a state which performs essential governmental functions is summoned into a federal court, it is in effect the state which is being summoned. To determine the applica-

bility of such a premise to a particular case it is necessary to review state law creating the entity and the treatment received by said entity from state courts. Such a review will show whether the entity is considered by the state as performing essential governmental functions and if so, whether the state has attempted to preserve its Eleventh Amendment immunity for said function. *Blake* v. *Kline*, 612 F.2d at 722; *Miller-Davis Company* v. *Illinois State Toll Highway Authority*, 567 F.2d 323, 330 (7th Cir. 1977). Petitioner's brief centers almost exclusively on language contained in the state law creating PRASA which refers to the exercise by PRASA of its powers as an essential government function. 22 L.P.R.A. § 142. The characterization of the exercise by PRASA of its powers as an essential government function does not have the significance which petitioner alleges when examined in the context of other state law and the treatment received by PRASA from the state courts.

In *A.A.A.* v. *Union Empleados A.A.A.*, 105 D.P.R. 437 (1976), the Supreme Court of Puerto Rico addressed the issue of whether PRASA employees enjoy the right to strike under Article II, Section 18 of the Constitution of Puerto Rico which grants said right to persons employed by private businesses, enterprises and individual employers and by agencies or instrumentalities of the government operating as private businesses or enterprises. The Court held that PRASA is undoubtedly structured as a "private business or enterprise," and as a matter of fact, "functions as such." *A.A.A.* at 457. The Court further held that the services rendered by PRASA are arguably rendered by a state-created entity because of historical circumstances rather than the intrinsic nature of the services. *Id.* The conclusion of the Supreme Court in effect states that the services rendered by PRASA are not an essential government function.

The conclusion of the Supreme Court of Puerto Rico in the case of *A.A.A.* is consonant with Rule 4.4 of the Puerto Rico

Rules of Civil Procedure which establishes that service of summons upon the Commonwealth of Puerto Rico shall be made by delivering a copy of the summons and the complaint to the Secretary of Justice of Puerto Rico. Service of summons upon an officer or agency of the Commonwealth of Puerto Rico shall be made by delivering a copy of the summons and the complaint to said officer or agency and to the Secretary of Justice of Puerto Rico. In contrast to the above, service of summons upon a "public corporation" shall be made by delivering a copy of the summons and the complaint to an officer or authorized agent of said public corporation in the same manner as if a private corporation, company, partnership, association or other artificial entity were involved. In *Canchani* v. *CRUV*, 105 D.P.R. 352, 357 (1976), the Supreme Court of Puerto Rico distinguished PRASA, an entity independent of the state government, from CRUV (Urban Renewal and Housing Corporation), a government agency but not a public corporation. Under Rule 4.4 of the Rules of Civil Procedure of Puerto Rico, service of summons upon PRASA is made in the same manner as upon a private corporation, company, partnership, association or other artificial person while service of summons upon government agencies is made to both the agency and the Secretary of Justice of Puerto Rico.

Analysis of the provisions of state law and the treatment afforded PRASA by state courts clearly demonstrates that PRASA is not the alter ego or arm of the Commonwealth of Puerto Rico nor is PRASA an entity as to which the Commonwealth government desires or recognizes sovereign immunity. PRASA is simply a publicly-created utility company that is structured, financed, operated, and treated both legally and practically like any other private business or enterprise. Such being the case, the decision of the Court of Appeals that PRASA is not entitled to partake of Eleventh Amendment immunity is consistent with both lines of analysis described by petitioner and thus this court should deny the petition for the writ of certiorari filed by PRASA.

II. The Court of Appeals' Holding That PRASA Waived Its Eleventh Amendment Immunity Follows the Controlling Decisions of This Court.

The Court of Appeals held that in the circumstances of this case where PRASA not only appeared and defended the claim on the merits, but also filed a counterclaim and a third-party complaint against the Insurance Company of North America, PRASA had voluntarily submitted to the jurisdiction of the federal courts thereby waiving any Eleventh Amendment immunity.

There is no question that a state may waive its Eleventh Amendment immunity and it has long been established that a general appearance may constitute such a waiver. *See Pennhurst State School and Hospital* v. *Halderman*, 104 S.Ct. 900. 907 (January 23, 1984); *Clark* v. *Barnard*, 108 U.S. 436 (1883).

As an exception to this rule, in *Ford Motor Co.* v. *Department of Treasury, etc.*, 323 U.S. 459 (1945), this Court decided, in the context of a case where the defendant state had obtained a favorable judgment in the district court which had been affirmed by the Court of Appeals and which was before this Court on plaintiff's petition for writ of certiorari, that the defendant state could first raise its objection to petitioner's suit as a violation of the Eleventh Amendment before this Court. Upon examining the argument presented on the waiver issue, this Court further held that the Attorney General of the defendant state was prohibited by the state constitution from waiving immunity and thus could not be found to have waived such immunity by his appearance and conduct in the proceedings. There is nothing in the Puerto Rico Constitution or laws which would prohibit or nullify such a waiver in the instant case.

In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), this Court decided that the issue of Eleventh Amendment immunity could be raised for the first time before the Court of Appeals.

However, the Court addressed the waiver issue solely upon the grounds that the defendant state had constructively consented to suit by participating in a federal program and agreeing to administer federal and state funds in compliance with federal laws. The Court did not directly address the effect, if any, of the defendant state's appearance and conduct during the trial on the merits held before the district court.

In view of the decisions of this court cited above, some courts have held that Eleventh Amendment immunity may be raised for the first time after entering a general appearance and defending on the merits even if such a course of action constitutes a virtual fraud upon the other parties to the suit. See *Dagnall* v. *Gegenheimer*, 631 F.2d 1195 (5th Cir. 1980), *reh'g denied* 645 F.2d 2 (5th Cir. 1981). Other courts have held that Eleventh Amendment immunity falls short of the right to decide whether or not to submit to the jurisdiction of the federal courts with the benefit of knowing what the decision of the federal court would be. *Newfield House* v. *Mass. Dept. of Public Welfare*, 651 F.2d 32 (1st Cir. 1981).

In the instant case, PRASA's defense on the merits was coupled with the filing of a counterclaim and a third party complaint against the Insurance Company of North America. Appearance of a state as a plaintiff in federal court has been held to constitute a waiver of its Eleventh Amendment immunity. PRASA's commencement of a third-party action against the Insurance Company of North America based on the same facts involved in the Complaint must be construed as a waiver of its Eleventh Amendment immunity concerning adjudication of said facts by the federal courts. *Mohegan Tribe* v. *State of Conn.*, 528 F.Supp. 1359, 1366 (D. Conn. 1982). A contrary decision, which would dismiss the Complaint for lack of jurisdiction while at the same time maintaining dismissal of the third-party complaint against the Insurance Company of North America on the merits would place plaintiff in the position of pursuing its claim before the state

court and subjecting itself to PRASA's counterclaim, when its bonding company has already been released from liability. The situation would be further complicated by the issue of collateral estoppel since the facts in question have already been established for the most part by the federal courts in order to decide the third-party complaint presented by PRASA. *Montana* v. *U.S.*, 440 U.S. 147, 153 (1979). This unworkable situation is caused by the fact that PRASA has passed the point of no return in the conduct of its litigation before the federal courts, and can only be avoided by holding that PRASA has waived any Eleventh Amendment immunity which it may have had.

III. The Decision of the Court of Appeals Does Not Involve an Imposition of Unjustified Cost Overruns on PRASA.

PRASA contends that the Court of Appeals ignored the essential elements that comprise a differing site condition claim, that Howard should reasonably have anticipated the conditions encountered, and that Howard's difficulties were caused by its own miscalculations and improper techniques.

The arguments presented by PRASA in support of its three allegations have a common element. Each cites part of the evidence presented to the district court during the trial of this case while at the same time ignoring the findings of fact entered by the district court and which the Court of Appeals refused to set aside as clearly erroneous.

Concerning the essential elements of a differing site condition, the district court specifically found that the soil conditions encountered in the vicinity of Manhole 49 were considerably less suitable than the general conditions prevailing in the area, a fact that was not shown in the plans and specifications prepared by PRASA. PRASA Pet. at 22b.

Concerning anticipation of the conditions encountered, the Court of Appeals noted the district court's reference to expert

testimony stating that the instability of the highway embankment in the vicinity of Manhole 49 was unusual, unexpected and not anticipated by any of the parties involved. Petition at 5a.

Concerning the claim that any difficulties were caused by Howard's miscalculations and improper techniques, the district court found that it was impossible to install the section of the pipeline between Manhole 49 and 53 without causing some degree of settlement to the embankment of P.R. Highway No. 2 and experiencing lateral displacement of the pipeline, that none of the expert witnesses which testified were able to present to the court any detailed, practical construction scheme which would guarantee the type of result which PRASA was requiring from Howard, and that it was in practical terms impossible to install the section of the pipeline between Manhole 49 and Manhole 53 as designed by PRASA without experiencing at least 7 inches of lateral displacement of the pipeline. Petition at 24b.

Clearly, it is not the function of this court to issue a writ of certiorari in order to review findings of fact entered by the district court and upheld by the Court of Appeals.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

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